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No. 311

In the Supreme Court of the United States

OCTOBER TERM, 1961

GENERAL IMPORT & EXPORT COMPANY, INC.

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CUSTOMS COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 811

GENERAL IMPORT & EXPORT COMPANY, INC.

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 21–35) is reported in 47 F. (2d) 336. That of the Circuit Court of Appeals (R. 42–47) has not yet been reported.

JURISDICTION

The final decree of the Circuit Court of Appeals (R. 47) was entered on March 9, 1932. Petition for certiorari was filed March 21, 1932, and certiorari was granted March 28, 1932. (R. 47–48.)

Jurisdiction to issue the writ rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a vessel seized by Coast Guard officers while illegally transporting intoxicating liquor within United States waters in violation of Section 26, Title II, of the National Prohibition Act may be libeled under Section 594 of the Tariff Act of 1922 for the collection of penalties imposed under Section 584 of the same Act for the master's failure to produce a lawful cargo manifest.

STATUTES INVOLVED

Sections 584 and 594 of the Tariff Act of 1922, and Section 26, Title II, of the National Prohibition Act are printed in the Appendix, *infra*, pages 8–11.

STATEMENT

The *Sebastopol*, a British Steamship, was seized by Coast Guard officers on August 11, 1927, while entering the harbor of New York with an unmanifested cargo of 4,841 cases of intoxicating liquor. (R. 9, 10, 18, 19, 20.) The seizure was made while the vessel was engaged in the act of transportation. (R. 9.) Upon the demand of the Coast Guard boarding officer the master of the *Sebastopol* did not produce a manifest for the cargo, which he admitted carrying. (R. 10, 18.) The appraised value of the vessel was $7,500, and the stipulated value of the liquor was $48,410. (R. 20.)

The master and crew of the seized ship were arrested and charged in a complaint with conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. (R. 6.) The record discloses no further information concerning any criminal prosecution.

In due course a libel of information was filed against the *Sebastopol* in the District Court for the Southern District of New York, wherein the Government attempted to enforce, under Section 594 of the Tariff Act of 1922, the liens of two penalties incurred by the master of the vessel under Section 584 of the same act, one of $500 for failing to produce a proper manifest and another equal to the value of the cargo for having on board merchandise not described in the manifest. (R. 2-3.) Together, the penalties claimed exceeded the value of the ship.

The General Import and Export Company, Ltd., intervened as owner of the *Sebastopol*. (R. 4.) In its answer it denied specifically the offense charged in the libel (R. 4), and then alleged that upon the seizure of the vessel the captain and crew of the vessel were arrested and charged in a complaint with a violation of Section 37 of the Criminal Code, the National Prohibition Act, and the Tariff Act of 1922 (R. 5). Claimant did not allege its innocence in the operation of the vessel for the transportation of intoxicating liquor within American waters.

The District Court entered a decree dismissing the libel (R. 36) on the ground that the Government's exclusive right of action was found in Section 26, Title II, of the National Prohibition Act. On appeal the judgment was reversed. (R. 47.)

ARGUMENT

There is no basis for the contention that the penalty provisions of Sections 584 and 594 of the Tariff Act of 1922 are rendered inoperative by Section 26, Title II, of the National Prohibition Act in cases involving the unlawful transportation of intoxicating liquor.

The issue in the instant case is quite different from those involved in *General Motors Acceptance Corporation* v. *United States*, No. 574, *United States* v. *Commercial Credit Co., Inc.*, No. 734, and *United States* v. *Two-Masted Auxiliary Schooner "Ruth Mildred,"* etc., No. 795, all the present term, which are to be argued immediately prior to this case. In the instant case the claimant contends that the vessel *forfeiture* provision (Section 26) of the National Prohibition Act is in direct conflict with *penalty* provisions of the Tariff Act of 1922. That contention prevailed in the District Court. The Circuit Court of Appeals took the opposite view, holding that there could be no direct statutory conflict since the remedy sought in one case was a forfeiture, while the remedy sought in the other was the enforcement of a lien for a statutory penalty assessed against the vessel's master.

There is no conflict of decisions on this particular issue, but the point is related generally to that involved in the various cases concerning forfeitures under the customs laws in liquor transportation cases decided since this Court's decision in *Richbourg Motor Company* v. *United States*, 281 U. S. 528. The Government did not, therefore, oppose the issuance of writ of certiorari.

We submit that the Circuit Court of Appeals is clearly right in holding that there is no direct conflict between a forfeiture statute and a penalty statute. The two are different in theory and distinguishable in effect. It would be carrying the doctrine of implied repeal beyond reasonable bounds to hold that two statutes so essentially different could be in direct conflict. As the Court of Appeals pointed out (R. 44) it is only by accident in the instant case that the penalty was so great as to exhaust the entire value of the vessel and result in her forfeiture.[1]

In forfeiture proceedings the law operates upon the title to the property. On the other hand, in a penalty suit the property is merely security to insure the payment of a money penalty. Such a proceeding does not necessarily affect the title.

[1] Our laws are replete with illustrations where the same transaction gives rise to both a penalty and a forfeiture. See Sections 453, 460, 586, and 587, respectively, of the Tariff Acts of 1922 and 1930, 42 Stat. 955, 956, 980, 981; 46 Stat. 716, 717, 749. It has never been suggested that such a situation in and of itself creates an inconsistency between the two legislative provisions.

Furthermore, it requires no extended argument to establish that the evidence necessary to support the one proceeding is essentially different from that required in the other. Because of these differences a conflict can not exist. *Carter* v. *McClaughry*, 183 U. S. 365; *Burton* v. *United States*, 202 U. S. 344; *Gavieres* v. *United States*, 220 U. S. 338; *Morgan* v. *Devine*, 237 U. S. 632.

The Circuit Court of Appeals goes farther and concludes that even if a conflict exists the provisions of the Tariff Act of 1922 must prevail over those of the National Prohibition Act because the former statute is later in enactment and provides specifically for the repeal of all prior laws inconsistent with its provisions. (Sec. 644, Tariff Act of 1922, 42 Stat. 990.) This conclusion would seem to be sustained by the decision of this Court in *Callahan* v. *United States*, No. 576, decided April 11, 1932.

While the decision in the instant case is broad enough in effect to govern the issue of conflict where *forfeiture* provisions of the Tariff Act are applied in liquor transportation cases, that issue is directly involved in *United States* v. *Corriveau*, No. 825, present term, which is now pending on the Government's petition for writ of certiorari.

We do not here discuss the apparent intent of Congress to preserve the customs laws for use where applicable in liquor cases. On that point reference is made to our brief in *General Motors Acceptance Corporation et al.* v. *United States*, No. 574, present term.

CONCLUSION

We respectfully submit that the decision of the Circuit Court of Appeals is correct and that its decree should be affirmed.

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APRIL, 1932.

APPENDIX

STATUTES INVOLVED

Tariff Act of 1922 (Act of September 21, 1922, c. 356, 42 Stat. 858, 980, 982):

> SEC. 584. FALSITY OR LACK OF MANIFEST.—Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after unlading from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge shall be subject to a penalty of $500: *Provided*, That if the collector shall be satisfied that the manifest was lost or mislaid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that no part of the merchandise not found on board was unshipped or discharged except as specified in

the report of the master, said penalties shall not be incurred. (U. S. C., Title 19, Sec. 486.)

SEC. 594. SEIZURE OF VESSELS AND VEHICLES.—Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same: *Provided,* That no vessel or vehicle used by any person as a common carrier in the transaction of business as such common carrier shall be so held or subject to seizure or forfeiture under the customs laws, unless it shall appear that the owner or master of such vessel or the conductor, driver, or other person in charge of such vehicle was at the time of the alleged illegal act a consenting party or privy thereto. (U. S. C., Title 19, Sec. 498.)

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315; U. S. C., Title 27, sec. 40):

When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any

person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county,

in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts. (U. S. C., Title 27, Sec. 40.)

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